SUPREME COURT OF THE UNITED STATES.

No. 101.

JOHN C. SHEPPARD ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN WILSON.

IN ERROR TO THE SUPREME COURT OF IOWA.

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J. & G. S. Gideon, printers.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the supreme court of the Territory of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court for the Territory of Iowa, before you, or some of you, being the highest court of law or equity of the said territory, in which a *decission* could be had in the said suit between John C. Sheppard, Pierre Chouteau, jr., John B. Sarpy, John F. H. Sandford, John P. Cabanna, S. A. Seire, Henry Sibley, Hercules Dousman, Wm. Hempstead, Edward Bebee, and William Cupp, plaintiffs in error, and John Wilson, defendant in error, a manifest error hath happened, to the great damage of the said Sheppard, Chouteau, Sarpy, Sandford, Cabanna, Seire, Sibley, Dousman, Hempstead, Bebee, and Cupp, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, this first Monday of December, in the year of our Lord eighteen hundred and forty-four.

Issued the 10th day of January, 1845.

GEORGE S. HAMPTON,
Clerk of the supreme court, I. T.

Allowed by CHARLES MASON,
Chief justice sup. court for Iowa Territory.

UNITED STATES OF AMERICA,
Territory of Iowa, ss:

I, George S. Hampton, clerk of the supreme court for Iowa Territory, do hereby certify, that in obedience to the command of the within writ of error, I herewith transmit to the Supreme Court of the United States the annexed transcript of the record and proceedings had in this court between the parties within named.

In witness whereof, I have hereunto set my name and affixed the seal of the said supreme court, at Iowa city, this 13th day of May, A. D. 1845.

[SEAL.]

GEO. S. HAMPTON,
Clerk of the supreme court, Iowa Territory.

Filed in my office, Jan. 10, 1845.
Test: G. S. HAMPTON, *C. S. C.*

The United States of America, to John Wilson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court for the Territory of Iowa, wherein John C. Sheppard, Pierre Chouteau, jr., John B. Sarpy, John T. H. Sandford, John P. Cabanna, S. A. Seire, Henry Sibley, Hercules Dousman, William Hempstead, Edward Bebee, and Wm. Cupp, are plaintiffs in error, and you are defendant in error, to shew cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Charles Mason, chief justice of the supreme court for the Territory of Iowa, this 10th day of January, in the year of our Lord eighteen hundred and forty-five.

CHARLES MASON,
Chief justice of the supreme court, Iowa Territory.

On this 10th day of January, in the year of our Lord eighteen hundred and forty-five, personally appeared Ebenezer Cook, before me, the subscriber, clerk of the supreme court of the Territory of Iowa, and makes oath that he delivered a true copy of the above citation to James Grant, esq., one of the attorneys of record of said John Wilson, on the 10th day of January, 1845.

GEORGE S. HAMPTON,
Clerk of the supreme court, Iowa Territory.

Filed in my office, Jan. 10th, 1845.
Test: GEO. S. HAMPTON, *C. S. C. I. T.*

UNITED STATES OF AMERICA,
Territory of Iowa, ss:

Pleas held before the honorable Charles Mason, chief justice, Joseph Williams and Thomas S. Wilson, associate justices, composing the supreme court, in and for the territory aforesaid, at the capitol, in Iowa city, on the tenth day of January, A. D. 1845.

JOHN C. SHEPPARD, Pierre Chouteau, jr., John B. Sharpy, John F. H. Sandford, John P. Cabanna, S. A. Seine, Henry Sibley, Hercules Dousman, William Hempstead, Edward Bebee, and William Cupp, plaintiffs in error,
against
JOHN WILSON, defendant in error.

Writ of error to the judgment of the district court of Scott county.

Be it remembered, that heretofore, to wit, on the 26th day of Sep-

tember, A. D. 1842, and on the 25th day of September, A. D. 1843, the said plaintiffs in error sued out of the clerk's office of the supreme court, in and for the territory aforesaid, the two following writs of error, to wit:

1*st writ of error.*

UNITED STATES OF AMERICA,

Territory of Iowa, ss:

To the honorable Thomas S. Wilson, judge of the district court for the county of Scott, greeting:

Whereas, at a district court, begun and held at the court house, in and for the county of Scott, on the 12th day of April, in the year of our Lord eighteen hundred and forty-two, a certain John Wilson, by the judgment of the said court, recovered against a certain John C. Sheppard, *Peirre* Chouteau, jr., John B. Sarpie, John F. H. Sandford, John P. Cabanna, S. A. Seine, Henry Sibley, Hercules Dousman, William Hempstead, and William Cupp, as well the sum of nineteen hundred and three $\frac{43}{100}$ dollars for his damages which he had sustained, as well as for his costs and charges by him about his suit in that behalf laid out and expended, whereof the said John C. Sheppard and others, the defendants aforesaid, are convict, as it is said; and because, in the record and proceedings, as also in the rendition of the said judgment, a manifest error hath happened, to the great damage of the said John C. Sheppard and others, the defendants as aforesaid, as in their complaint hath been stated; therefore, you are hereby commanded, that, if the judgment aforesaid be therein given, then, under your seal, you do distinctly and openly send the record and proceedings aforesaid, with all things thereunto relating, to the supreme court of the territory aforesaid, to be held at Iowa city, on the first Monday of January next, together with this writ; that the record and proceedings aforesaid being inspected, the said supreme court may further cause to be done therein, for the correcting of that error, what of right and according to the laws and customs of the land, may be done.

Witness the honorable Charles Mason, chief justice of the supreme court, this 26th day of September, eighteen hundred and forty-two.

[SEAL.]

GEO. S. HAMPTON.
Clerk of the supreme court.

I hereby order this writ to be a supersedeas to the judgment therein mentioned, as there is probable cause of error in the proceedings.

J. WILLIAMS, *Judge of sup. court.*

Endorsed.—In pursuance of the within writ, I send up the following transcript.

Dec. 28th, 1843.

D. HOGE,
Clk. D. C. Scott co.

2nd writ of error.

UNITED STATES OF AMERICA,
Territory of Iowa, ss:

To the honorable Thomas S. Wilson, judge of the district court for the county of Scott, greeting:

Whereas, at a district court, begun and held at the court house, in and for the county of Scott, on the third day of October, in the year of our Lord eighteen hundred and forty-two, a certain John Wilson, by the judgment of the said court, recovered against John C. Sheppard, Peirre Chouteau, jr., John B. Sarpie, John F. H. Sanford, John P. Cabanna, S. A. Seine, Henry Sibley, Hercules Dousman, William Hempstead, Edward Beebe, and William Cupp, as well the sum of eighteen hundred and thirty-seven dollars and fifty cents for his damages which he had sustained, as the sum of sixty-seven dollars and seventy-four and one-half cents for his costs and charges by him about his suit in that behalf laid out and expended, whereof the said John C. Sheppard and others, defendants as aforesaid, are convict, as it is said. And because, in the record and proceedings, as also in the rendition of the said judgment, a manifest error hath happened, to the great damage of the said John C. Sheppard and others, defendants as aforesaid, as in their complaint hath been stated.

Therefore, you are hereby commanded, that if the judgment aforesaid be therein given, then, under your seal, you do distinctly and openly send the record and proceedings aforesaid, with all things thereunto relating, to the supreme court for the territory aforesaid, to be held at Iowa city, on the first Monday of January next, together with this writ; that the record and proceedings aforesaid being inspected, the said supreme court may further cause to be done therein, for the correcting of that error, what of right, and according to the laws and customs of the land, may be done.

Witness the honorable Charles Mason, chief justice of the supreme court, this 25th day of September, eighteen hundred and forty-three.

[L. S.] GEO. S. HAMPTON,
Clerk of the supreme court.

Endorsed: In pursuance of the within writ, I send up the following transcript.

D. HOGE,
Decr. 28th, 1843. *Clerk D. C. Scott co. Iowa.*

And afterwards, to wit, on the 2d day of January, A. D. 1844, the said plaintiffs in error, by their attorney, filed in the clerk's office of the supreme court, in and for the Territory of Iowa, the following transcript of the record and proceedings, in pursuance of the command of said writs of error, to wit:

Transcript from the district court.

At a district court of the United States of America, within and for the county of Scott, and Territory of Iowa, begun and held at the court

house in Davenport, in said county, on the first Monday next after the fourth Monday in September, to wit, the fifth day of October, A. D. 1840, was present: The honorable Thomas S. Wilson, presiding judge; Adrian H. Davenport, sheriff; and David Hoge, clerk.

Among other were the following proceedings, to wit: Be it remembered, that heretofore, to wit, on the 22d day of July, in the year of our Lord 1840, John Wilson sued out of the clerk's office of the district court aforesaid, the following writ of summons against John C. Sheppard, H. N. Davis & Co., and Hempstead and Bebee, to wit:

Summons.

TERRITORY OF IOWA, *Scott county, ss:*

The United States of America, to the sheriff of said county, greeting:

You are hereby commanded to summon John C. Sheppard, H. N. Davis & Co., and Hempstead and Bebee, if to be found in your county, to be and appear before the district court of said county, on the first day of the next term thereof, to be begun and held at Davenport in said county, to answer unto John Wilson in a plea of assumpsit to his damage three thousand dollars, and have you then there this writ, with a return of your doings herein.

Witness the honorable Thomas S. Wilson, judge of the third judicial district of said territory, and the temporary seal of said court affixed, this 22d day of July, A. D. 1840.

[L. S.]

D. HOGE,
Clerk dist. court, Scott county.

Sheriff's return. And afterwards, the said writ was returned to the court aforesaid by said sheriff, endorsed as follows, to wit: "Served on John C. Sheppard, on the 1st day of August, 1840, by reading; H. N. Davis & Co. not found.

H. A. DAVENPORT, *Sheriff.*
By L. E. JOHNSON, *Deputy.*"

And afterwards, to wit, on the 22d day of September, A. D. 1840, John Wilson filed in the clerk's office of the district court aforesaid the following declaration, to wit:

District court, fall term, 1840. *Declaration.*

TERRITORY OF IOWA, *Scott county.*

John Wilson, by attorney, complains of John C. Shephard, H. N. Davis & Co., and Hempstead and Beebe, in a plea of trespass on the case, &c., on promises; for that whereas, heretofore, to wit, on the twelfth day of July, in the year of our Lord eighteen hundred and forty, at Stephenson, in the State of Illinois, to wit, in the county aforesaid, said defendants hired of the said plaintiff his steam ferry boat, called the Rock Islander, to lighten the cargo of a certain steamboat of the said defendants, called the "Ariel," over the upper rapids; and the said plaintiffs, at the special instance and request of the said defendants, did, on the said 12th day of July, A. D. 1840, contract and agree, to

and with the said defendants, owners of said steamboat "Ariel," to hire to them his, the said plaintiff's steam ferry boat, Rock Islander, to lighten the cargo of the said steamer Ariel over the upper rapids of the Mississippi river, for and on condition that they, the said defendants, should pay him for the use of his said boat at the rate of fifty dollars per day, and find and furnish said steamer Rock Islander with hands and pilots, as also fuel, and the necessaries for running the said boat over the said rapids, and to return her to the said plaintiff at Stephenson, Illinois, in the like good order as received; and that said defendants did, by their agent, John C. Shepherd, then being the master and commander of the said steamboat "Ariel," and acting as agent for himself and the other defendants above named, receive the said steam ferry boat, called the Rock Islander, into his possession, as such master and commander as aforesaid, on the said 12th day of July, A. D. 1840, at Stephenson, Illinois; and the plaintiff further saith, that the said defendants, not regarding their said promise and undertaking so made as aforesaid, did not nor would furnish the said steamer Rock Islander with hands, pilots, fuel, and other necessaries for running over said upper rapids of the Mississippi river, and return her in the like good order as received, and pay him at the rate of fifty dollars per day for the use of said boat, as they had promised and agreed to do; but, on the contrary thereof, after they had so received the said steam ferry boat Rock Islander into their possession as aforesaid, to wit, on the 12th day of July, A. D. 1840, did not nor would furnish the said boat with suitable and skilful pilots, sufficient hands, wood, and other necessaries, to run over said rapids, but failed and neglected so to do, and so carelessly and unskilfully and improperly managed and conducted the said steam ferry boat Rock Islander, that she was run on and against a rock or stone on said rapids, with such force and violence as to knock a hole through her bottom, whereby she became damaged and unfit for use; and the plaintiff further sheweth, that the said defendants did not return said boat to him at Stephenson, Illinois, in the like condition they received her, and pay him at the rate of fifty dollars per day for the use of said boat; but, on the contrary, that they wholly failed and refused so to do. And for that, whereas the said plaintiff, at the special instance and request of the said defendants at Stephenson, Illinois, to wit, in the county aforesaid, on the 12th day of July, A. D. 1840, hired to the said defendants a certain other steam ferry boat, called the Rock Islander, of him, the said plaintiff, and delivered her to them on the 12th day of July, 1840, to be by them used to lighten the cargo of a certain other steamboat of the said defendants, called the "Ariel," over the upper rapids of the Mississippi, at and for the price and consideration, that they, the said defendants, should and would pay to him, the said plaintiff, at the rate of fifty dollars per day for the use of his said boat Rock Islander, during the time they should keep said steam ferry boat Rock Islander in their possession, and until they should return her to him at Stephenson, Illinois, in like good order which they received her; and the plaintiff further sayeth, that said defendants did, in consideration that the plaintiff would hire to

them his said ferry boat Rock Islander, to lighten the cargo of their said steamboat Ariel over the upper rapids, contract, promise, and agree to furnish his said ferry boat with pilots, hands, fuel, and other necessaries, to run her over the said rapids and back, and to deliver her to him at Stephenson, Illinois, in the like good order and condition as received, and to pay him at the rate of fifty dollars per day for each day they should keep said ferry boat in their possession, and until they should return her as aforesaid, to him at Stephenson, Illinois; nevertheless, the said defendants, not regarding their said several promises and undertakings so made as aforesaid, did not, nor would, keep and perform the same; but, on the contrary thereof, after receiving the said ferry boat into their possession as aforesaid, on the said 12th day of July, A. D. 1840, to be supplied, used, and returned as aforesaid, so carelessly and improperly used said boat, that she, by the want of care and skill in the management of her, was run on and upon the said rapids, and injured and damaged so as to be unfit for use, and kept and detained the said boat, and did not return her to the plaintiff, at Stephenson aforesaid, in the like good order as received, or pay him for the use of said boat at the rate of fifty dollars per day, but refused and failed so to do, to the damage of said plaintiff of three thousand dollars; and therefore he sues, &c.

G. C. R. MITCHELL,
JAMES GRANT, &
J. H. THORINGTON,
Plaintiff's attorneys.

First plea in abatement.

And afterwards, to wit, on the 7th day of October, in the year aforesaid, the said defendants filed in the court aforesaid the following plea in abatement, to wit:

TERRITORY OF IOWA, *Scott county, ss:*

United States district court, October term, A. D. 1840.

JOHN WILSON,
vs
JOHN C. SHEPHERD, H. N. Davis and Hempstead & Bebee.

And the said defendants, by their attorneys, Learned and Wells, come and defend the wrong and injury, when, &c., and pray judgment of the said writ and declaration, because they say that the said several supposed promises and undertakings in the said declaration mentioned, if any such were made, were, and each of them was, made by the said defendants jointly, with Piere Chouteau, jr., John B. Sarpie, John F. H. Sanford, John P. Cabanna, S. A. Sein, Henry Sibly, Henlin Dousman, William Hempstead, Edward Bebee, and William Cupp, joint owners of the steamboat Ariel, which is attached at the suit of said John Wilson against said defendants, who are still living, and not by the said defendants alone. And this they, the said defendants, are ready to verify. Whereof, inasmuch as they, the said Piere Chouteau

and the others above specified as not joined, are not named in the said writ and declaration together with the said defendants, they, the said defendants pray judgment of the said writ and declaration, and that the same may be quashed.

LEARNED & WELLS,
Attorneys for defendants.

Edward Hogan, pilot of the steamboat Ariel, maketh oath and saith, that the plea hereunto annexed is true, in substance and fact, to the best of his knowledge and belief. EDWARD HOGAN.

Sworn to and subscribed before me, this seventh day of October, A. D. 1840.

D. HOGE, *Clerk.*

And afterwards, to wit, on the day and year last aforesaid, the said defendants filed the following second plea in abatement, to wit:

2nd Plea in abatement.

United States district court, October term, A. D. 1840.

IOWA TERRITORY, *Scott county, ss:*

JOHN WILSON,
vs.
JOHN C. SHEPHERD, H. N. Davis & Co., and Hempstead & Bebee.

And the said defendants, by Learned & Wells, their attorneys, come and defend the wrong and injury, when, &c., and pray judgment of the said writ and declaration, because they say that the said several supposed promises and undertakings in the said declaration mentioned, if any such were made, were, and each of them was, made by the said defendants, jointly with one David Wilson, partner of the said John Wilson, and joint owner in the steamboat Rock Islander, subject matter of this suit, and jointly interested in the avails and earnings of said steamboat Rock Islander, who is still living, and not by the said defendants to the [said] John Wilson alone; and this they, the said defendants, are ready to verify; whereof, inasmuch as the said David Wilson is not named in the said writ and declaration, together with the said John Wilson, they, the said defendants, pray judgment of the said writ and declaration, and that the same be quashed, &c.

LEARNED & WELLS,
Attorneys for def'ts.

Joseph B. Wells, one of the attorneys for said defendants, being first duly sworn according to law, maketh oath and saith, that the plea hereunto annexed is, as he is informed, and verily believes, true in substance and facts.

Sworn to and subscribed before me, this seventh day of October, A. D. 1840. JOS. B. WELLS.

D. HOGE, *Clerk.*

Replication.

JOHN WILSON,
vs.
JOHN C. SHEPPARD, H. N. Davis & Co., and Hempstead & Bebee.

And the said plaintiff saith, that his said writ and declaration, by reason of any thing by the said defendants in their said plea above alleged, ought not to be quashed, because he says that the said several promises and undertakings in his said declaration mentioned were not made by the said defendants, jointly with one David Wilson, partner of the said plaintiff, and joint owner in the steamboat Rock Island, and jointly interested in the avails and earnings of said steamboat Rock Islander, in manner and form as said defendants have above in their said plea in that behalf alleged, and this the plaintiff prays may be enquired of by the country, &c.

JAMES GRANT, THORINGTON & MITCHELL,
Attorneys for pl'ff.

The above replication filed March 31st, 1841.

D. HOGE, *Clerk.*

Joinder.

And the said defendants doth the like.

J. D. LEARNED & WELLS,
Attorneys for def'ts.

2d Plea in abatement withdrawn.

On the said plea is the following endorsement, to wit, "defendant's 2nd plea in abatement withdrawn."

D. HOGE, *Clerk.*

Oct. 6th, 1841.

And afterwards, to wit, on the day and year aforesaid, to wit, (the 7th day of October, 1840,) the said defendants filed the following third plea in abatement, to wit:

3d Plea in abatement.

United States district court, October term, A. D. 1840.

TERRITORY OF IOWA, *Scott county, ss:*

JOHN WILSON,
vs.
JOHN C. SHEPHERD, H. N. Davis & Co., and William Hempstead and Edward Bebee, sued by the name of Hempstead and Bebee.

And the said William Hempstead and Edward Bebee, against whom the said John Wilson hath sued out his writ and filed his declaration,

by the name of Hempstead and Bebee, by their attorneys, Learned and Wells, come and say, that they are named and called by the name of William Hempstead and Edward Bebee, and by these names have always, since the time of their nativity, hitherto been named and called, and this they are ready to verify. Wherefore they pray judgment of the said writ and declaration, and that the same may be quashed, &c.

LEARNED & WELLS,
Def'ts' attorneys.

J. D. Learned, one of the defendants' counsel in the above cause, maketh oath and saith, that the plea hereunto annexed is true, in substance and fact, to the best of his knowledge and belief.

Sworn to and subscribed before me, this seventh day of October, A. D. 1840

J. D. LEARNED.
D. HOGE, *Clerk.*

And afterwards, to wit, on the day and year last aforesaid, the said defendants filed the following fourth plea in abatement, to wit:

4th Plea in abatement.

United States district court, October term, A. D. 1840.

IOWA TERRITORY, *Scott county, ss:*

JOHN WILSON,
vs.
JOHN C. SHEPPARD, H. N. Davis & Co., and Hempstead & Bebee.

And the said defendants, John C. Shepperd and Hempstead & Bebee, by their attorneys, come and defend the wrong and injury, when, &c., and pray judgment of the said writ and declaration, because they say that the said several supposed promises and undertakings in the said declaration mentioned, if any such were made, were, and each of them was, made by the said defendants alone, and not with the said H. N. Davis & Co., and this they, the said defendants, are ready to verify. Whereof, inasmuch as the said H. N. Davis & Co. are joined together with the said defendants, they, the said defendants, pray judgment of the said writ and declaration, and that the same may be quashed.

LEARNED & WELLS,
Attorneys for def'ts.

Edward Hogan, pilot of the steamboat Ariel, maketh oath and saith, that the plea hereunto annexed is true, in substance and in fact, to the best of his knowledge and belief.

EDWARD HOGAN.

Sworn and subscribed before me, this seventh day of October, 1840.
D. HOGE, *Clerk.*

Continued.

And afterwards, to wit, on the 9th day of October, in the year last

aforesaid, it was ordered, that this cause stand continued until the next term of this court, at the defendants' costs.

And afterwards, to wit, on the 8th day of April, in the year of our Lord eighteen hundred and forty-one, the following proceedings were had, to wit:

JOHN WILSON,
vs.
JOHN C. SHEPPARD, H. N. Davis & Co., and Hempstead & Bebee.

Plaintiff's motion to reject pleas in abatement.

And the said plaintiff, by his attorney, moves the court to reject all the pleas in abatement filed in this cause, except the one replied to by the plaintiff, because a defendant is not allowed by *law*, or by leave of the court, to file more than one plea in abatement, and because no leave has been obtained to file more than one plea in abatement.

MITCHELL, GRANT & THORINGTON,
for Pl'ff.

Agreement.

And afterwards, to wit, on the day and year last aforesaid, the following agreement was filed, to wit:

JOHN WILSON,
against
JOHN C. SHEPPERD and others, def'ts.

Action of assumpsit in the district court for Scott county.—March term, 1841.

The parties to the above suit enter into the following agreement, by their respective attornies, in relation to said suit, which is to be filed of record in the cause, to wit:

First. The plaintiff shall be at liberty to amend his writ and declaration, by striking out the name of H. N. Davis & Co., as defendants to said action, where their said names occur.

Second. The defendant has judgment upon his first plea in abatement, for a non joinder of defendants, and the plaintiff shall amend his said declaration under said plea, as the statute requires.

Third. Issue to be joined upon the defendant's second plea in abatement, for non joinder of plaintiffs; or if the defendant elects, he may withdraw said plea, and go to trial upon pleas to the action, and will plead to the action when the said declaration has been amended as aforesaid.

Fourth. The defendant withdraws his *third* and *fourth* pleas in abatement.

Either party may issue commissions to take testimony abroad, if they deem it necessary to do so, under the provisions of the statute.

The said suit to stand continued generally until the next term of this court.

Davenport, April 6th, 1841.

J. D. LEARNED & WELLS,
Attorneys for def'ts.
GRANT, THORINGTON & MITCHELL,
Attorneys for pl'ff.

Continued.

And afterwards, to wit, on the 8th April, in the year aforesaid, this cause was continued until the next term of this court.

And afterwards, to wit, at a district court of the United States of America, within and for the county of Scotland, Territory of Iowa, begun and held at the court house in Davenport in said county, on the first Monday next after the fourth Monday in September, to wit, the 4th day of October, A. D. 1841.

Present: Hon. Thomas S. Wilson, presiding judge; Adrian H. Davenport, esq., sheriff; and David Hoge, clerk.

Were the following proceedings, to wit:

Be it remembered, that heretofore, to wit, on the 24th day of September, in the year of our Lord eighteen hundred and forty-one, John Wilson filed in the clerk's office of the district court aforesaid the following amended declaration, to wit:

Amended declaration.

TERRITORY OF IOWA, *Scott county, ss:*

District court, October term, 1841.

John Wilson, by attorney, complains of John C. Sheppard, *Piere* Choteau, junior, John B. Sarpie, John F. H. Standford, John P. Cabanne, S. A. Sein, Henry Sibley, Hercules Douman, William Hempstead, Edward Bebee, and William Cupp, in a plea of trespass on the case, &c., on promises. For that whereas, heretofore, to wit, on the twelfth day of July, in the year of our Lord eighteen hundred and forty, at Stevenson, in the State of Illinois, to wit, in the county aforesaid, said defendants hired of the said plaintiff his steam ferry boat, called the Rock Islander, to lighten the cargo of a certain steamboat of the said defendants, called the Ariel, over the upper rapids; and the said plaintiff, at the special instance and request of the said defendants, did, on the 12th day of July, A. D. 1840, contract and agree, to and with the said defendants, owners of said steamboat "Ariel," to hire to them his, the said plaintiff's, steam ferry boat Rock Islander, to lighten the cargo of the said steamer Ariel over the upper rapids of the Mississippi river, for and on conditions that they, the said defendants, should pay him for the use of his said boat at the rate of fifty dollars per day, and find and furnish said steamer Rock Islander with hands and pilots, as also fuel and the necessaries for running the said boat over the said rapids, and to return her to the said plaintiff at Stevenson, in the like good order as received; and that said defendants did, by their agent John C. Sheppard, then being the master and commander of the said

steamboat Ariel, and acting as agent for himself and the other defendants above named, receive the said steam ferry boat, called the Rock Islander, into his possession, as such master and commander as aforesaid, on said 12th day of July, A. D. 1840, at Stephenson Illinois. And the plaintiff further *sayeth*, that the said defendants, not regarding their said promise and undertaking so made as aforesaid did not, nor would furnish the said steamer Rock Islander with hands, pilots, fuel, and other necessaries, for running over said upper rapids of the Mississippi river, and return her in the like good order as received, and pay him at the rate of fifty dollars per day for the use of said boat, as they had promised and agreed to do; but, on the contrary thereof, after they had so received the said steam ferry boat Rock Islander into their possession as aforesaid, to wit, on the 12th day of July, A. D. 1840, did not nor would furnish the said boat with suitable and skilful pilots, sufficient hands, wood, and other necessaries to run over said rapids, but failed and neglected so to do; and so carelessly, and unskilfully, and improperly managed and conducted the said steam ferry boat Rock Islander, that she was run on and against a rock or stone on said rapids, with such force and violence as to knock a hole through her bottom, whereby she became damaged and unfit for use. And the plaintiff further sheweth, that the said defendants did not return said boat to him at Stephenson Illinois, in the like condition they received her, and pay him at the rate of fifty dollars per day for the use of said boat; but, on the contrary, that they wholly failed and refused so to do; and for that whereas the said plaintiff, at the special instance and request of the said defendants, at Stephenson, Illinois, to wit, in the county aforesaid, on the 12th day of July, in the year of our Lord eighteen hundred and forty, hired to the said defendants a certain other steam ferry boat, called the Rock Islander, of him, the said plaintiff, and delivered her to them, on the 12th day of July, 1840, to be by them used to lighten the cargo of a certain other steamboat of the said defendants, called the "Ariel," over the upper rapids of the Mississippi, at and for the price and consideration that they, the said defendants, should and would pay to him, the said plaintiff, at the rate of fifty dollars per day, for the use of his said boat Rock Islander, during the time they should keep said steam ferry boat Rock Islander in their possession, and until they should return her to him at Stephenson, Illinois, in like good order which they received her. And the plaintiff further *sayeth*, that said defendants did, in consideration that the plaintiff would hire to them his said ferry boat Rock Islander, to lighten the cargo of their said steamboat Ariel over the upper *rapids*, contract, promise, and agree to furnish his said ferry boat with pilots, hands, fuel, and other necessaries, to run her over the said rapids and back, and to deliver her to him at Stephenson, Illinois, in the like good order and condition as received, and to pay him at the rate of fifty dollars per day for each day they should keep said ferry boat in their possession, and until they should return her as aforesaid to him, at Stephenson, Illinois. Nevertheless, the said defendants, not regarding their said several promises and undertakings, so made as afore-

said. did not nor would keep and perform the same; but, on the contrary thereof, after receiving the said ferry boat into their possession as aforesaid, on the said 12th day of July, in the year of our Lord one thousand eight hundred and forty, to be supplied, used, and returned as aforesaid, so carelessly and improperly used said boat that she, by the want of care and skill in the management of her, was run on and upon the said rapids, and injured and damaged so as to be unfit for use, and kept and detained the said boat, and did not return her to the plaintiff, at Stephenson aforesaid, in the like order as received, or pay him for the use of said boat at the rate of fifty dollars per day, but refused and failed so to do, to the damage of said plaintiff of three thousand dollars; and therefore he sues, &c.

G. C. R. MITCHELL.
JAMES GRANT, and
J. H. THORINGTON,
Plaintiff's attornies.

Rule against defendants to plead.

And afterwards, to wit, on the fourth day of October, in the year aforesaid, (1841,) on motion of plaintiffs' attorney, it was ordered, that the defendants plead to the amended declaration of said plaintiff by Tuesday morning.

Motion for a non-suit.

And afterwards, to wit, on the 6th day of October, in the year aforesaid, the said defendants filed the following motion for a non-suit, to wit:

SHEPPARD and others, ads. JOHN WILSON.

In the above cause, the defendants move the court for a judgment of non-suit, because the instrument of writing in the plaintiffs' said declaration mentioned, on which this suit is brought, has not been filed before the second day of the term, nor any copy thereof, agreeably to the statute in such case made and provided.

J. D. LEARNED,
Att'y for def'ts.

Motion for non-suit overruled.

And afterwards, to wit, on the same day and year last aforesaid, this cause came on to be heard on the motion for a non-suit this day, and the arguments of counsel having been heard and considered, it is ordered that said motion be overruled.

And afterwards, to wit, on the same day and year last aforesaid, the said defendants filed in the court aforesaid the following plea, to wit:

Defendant's plea.

District court, October term, 1841.

TERRITORY OF IOWA, *Scott county, ss:*

JOHN C. SHEPPARD, Piere Chouteau, jr., John B. Sarpie, John F. H. Sanford, John P. Cabanna, S. A. Sain, Henry Sibley, Hercules Dousman, William Hempstead, Edward Bebee, William Cupp,
ads.
JOHN WILSON.

And the said defendants, by Learned and Wells, their attornies, come and defend the wrong and injury, when, &c., and for plea say, they did not assume and promise in manner and form as the plaintiff above in his said declaration hath thereof complained against them, and of this they put themselves upon the country.

By their attorneys: LEARNED & WELLS.

And afterwards, to wit, on the day and year last aforesaid, the following proceedings were had, to wit:

Jury.

This day came the parties, by their attorneys, and thereupon came a jury, to wit, John H. Robinson, George Dailey, Benjamin Johnson, Samuel Sloper, Joseph C. Quinn, Horace Wood, James V. B. Franks, Giles M. Pinnco, Caleb H. Gardner, Lucius Moss, Stephen Henley, and Eleazer Parkhurst, who being empannelled and sworn the truth to speak upon the issue joined between the parties, and after hearing a part of the testimony in the case, the court adjourned until to-morrow morning at 8 o'clock.

And afterwards, to wit, on the 7th day of October, in the year aforesaid, the following proceedings were had, to wit:

Jury met.

This day came the parties, by their attorneys, and thereupon came the jury empannelled and sworn in this cause yesterday, and after hearing the balance of the testimony in the case, and the arguments of counsel, and being charged by the court, and thereupon the said defendants tendered the following bill of exceptions, to wit:

Bill of exceptions.—Bill of exceptions.

Action of assumpsit in the district court for the county of Scott, October term, 1841.

JOHN WILLSON
vs.
JOHN C. SHEPHERD and others, defts.

In the trial of the above cause, the plaintiff, to support the issue on

his part, offered in evidence to the jury the contract in writing, in the proceedings in this cause mentioned, and on which this suit is brought, in the words and figures following, to wit:

I promise to pay John Wilson, at the rate of fifty dollars per day, for the use of his ferry boat Rock Islander, to lighten the cargo of the steamer Ariel over the upper rapids, of which fifty dollars is paid in advance; to furnish the boat with hands and pilots, as also fuel, and the necessaries for running the boat over, and return her to the said Wilson, at Stephenson, Ill., in like good order as received.

J. C. SHEPHERD,
For S. B. Ariel and owners.

STEPHENSON, *July 12th*, 1840.

And proved the execution thereof by the said John C. Shepherd, one of the defendants.

The plaintiff then offered evidence, by Horace Anthony, to prove that the said Shepherd took possession of the said steamboat Rock Islander on the day she was hired to him, as stated in said contract; that he afterwards saw the said boat lying at Davenport, by the shore of the river, just above the ferry landing of the plaintiff.

He further states, that he saw the said boat on the day the contract was made, and examined her where her timbers had been injured the year before by the Jone steamboat, and the boat appeared to be in a good condition; that on the 2d of September, 1840, he went down the river in the said boat to St. Louis, and the boat took down with her a keel boat containing about 70 tons of lead, and was five days going down, including one day detained at the lower rapids in getting the keel boat over; and on the 14th day of Sept., the said boat was put upon the dry dock to be repaired the injury she had sustained while she was in the employment of Capt. Shepherd; and that the whole cost of the repairs put upon her, including eight timbers, about seven feet long, to repair the injury done the said boat the year before by the Jone, and the plaintiff, amounted to the sum of $250 67, from which is to be deducted $8 50, as appears by the bill thereof, as follows:

Ferry boat Rock Islander and owners, to Dry Dock Co. DR.

1840.		
Sept. 14	To raising on dock - - - -	$150 00
15	3 carpts. and caulk, 1 d., ea. 2½ -	7 50
	2 " " ½ " -	2 50
	5 " " ¼ " -	3 12
	55 lbs. oakum, 13 - - -	7 15
16	8 carpts. and caulks., 1 d. - -	20 00
	7 " " ½ - -	8 75
	1 " " ¾ - -	1 87
	1 knee, 6 in. d., 40 - - -	2 40
17	3 carpts. and caulks, ¾ d. ea. - -	5 62
	2 " " ½ - -	2 50
	11 " " ¼ - -	6 87
	¾ lb. pitch, 6.50 - - -	4 87
18	10 carpts. caulks., ½ d. - - -	12 50
	7 " " ¼ - - -	4 37
	1 screw-bolt - - - -	25
		$240 27
	Timber from mill - -	10 40
		$250 67
CR.	68 lbs. spikes, 12½ - - - -	8 50
		$242 17

Rec'd payment for Dry Dock Co.,
SAMUEL TURNWAY.

He further states, four of these timbers were put in on account of the damage done by the Jone, and for which the owners of the Jone paid the plaintiff $25.

The plaintiff further proved by said witness, that the injury done the said steamboat Rock Islander, while employed by Capt. Shepherd, was the breaking of two holes in the bottom of said boat, one near the bow, and the other near the centre of the boat; that these holes had been stopped by putting bulk-heads around them and caulking them to keep out the water, which were about two feet long and a foot wide each, but that the boat continued to leak, and required to be daily pumped; and that the plaintiff put some other plank around them, and caulked them before he took the boat down to St. Louis; and that the expenses incurred in taking down the boat, with the keel while there, and in bringing her back, were $391 12, as appears by the bill presented.

Expenses of steamboat Rock Islander from Stephenson to St. Louis and back, viz:

For master, 21 days, $2 50	$52 50
pilot	75 00
engineer, 21 days, 2 50	52 50
cook, 21 days	21 00
2 firemen, 10	20 00
1 deck hand, 10 days	10 00
provisions	63 00
19¾ cords wood	35 50
60 bushels coal	9 00
returning 59 bushels coal	7 37
" 27½ cords wood	45 25
	$391 12

Cr.—By delay occasioned by towing keel boat from Stephenson to St. Louis and back, ninety dollars.

Started from Stephenson, September 2, 1840, and returned September the 23d.

On which said bill is a credit on account of the keel boat of ninety dollars, made by the plaintiff, and that said boat returned to Stephenson on the 23d day of said September, and was four days in returning.

The plaintiff further proved, by Lockwood J. Center and Hale, that the steamboat Rock Islander was in good condition when she was hired to the defendants; that Charles Willson, nephew of the plaintiff, had been employed as engineer of said boat for some time previous to the hiring to the defendants, and that he went up the river in said boat with Capt. Shepherd, and returned in it when said boat came back to Davenport; and that she was absent on this service three days, but Capt. Shepherd's hands were employed about *the* 8 or ten days after in attempting to repair her, during which time she was in the possession of said Shepherd.

The plaintiff further offered a certificate of inspection of said boat at St. Louis.

Port of St. Louis, Mo.

I do hereby certify, that I have examined the hull of the steamboat Rock Islander, and find her age to be two months. She was originally built at Stephenson, Ill., and has been running about 20 days. She is sound, and in all respects seaworthy, and fit to be used for the transportation of freight or passengers.

Given under my hand, this 22d day of November, 1839.

H. SINGLETON, *Hull examiner.*

Shewing her condition subsequent to the injury done her by the plaintiff and the steamboat Jone, and here rested his case.

The defendant, to support the issue on his part, then offered evidence, and proved by Isaac Williams, that he was employed by Capt. Shepherd to assist in raising said boat Rock Islander on the Rapids; that during this time Capt. Shepherd was on board as captain, and Charles Willson acted as the engineer of said boat, and he saw him start down the river with her when he left; that two holes were broken through the bottom of said boat, while on the rock, of about one foot long each, and nearly a foot wide.

The defendants further offered in evidence, and read the same to the jury, the following transcript of a record of a suit brought in the county of Rock Island, in the State of Illinois, by the said plaintiff and his partner in the ownership of said steamboat Rock Islander, David Willson, against the said defendants, in the words and figures following, to wit:

"John Willson, being first duly sworn, according to law, before the clerk of the Rock Island county circuit court, complains, on oath, that J. C. Shepherd, Hempstead and Bebee, and American Fur Company, are justly indebted to myself and David Willson, as partners, in the sum of two thousand and five hundred dollars, upon a certain promise in writing, made by said defendants to me, the said John Willson, for the benefit of said partners, dated July 12th, 1840, for the use of one steamboat Rock Islander, and for the damage done to her by said defendants; and also that said defendants are about to depart from this State, with the intention of having their effects and personal estate removed without the limits of this State.

"JOHN WILLSON.

"*July 22d*, 1840.

"Sworn to before me, this 22d day of July, eighteen hundred and forty.

"JOSEPH CONWAY,

"*Clerk of the circuit court of Rock Island county, Ill. State.*"

Know all men by these presents that we, John Willson, and David Willson, and John W. Spencer, are held and firmly bound unto J. H. Shepherd, Hempstead and Bebee, and American Fur Company, in the penal sum of five thousand dollars; for the payment of which, we bind ourselves, our heirs, executors, and administrators. Witness our hands and seals, this 22d day of July, 1840.

The condition of this obligation is such, that whereas the above bounden John Willson and David Willson hath, on the day of the date hereof, prayed an attachment, at the suit of John Willson against the estate of the above named J. H. Shepherd and others, for the sum of two thousand and five hundred dollars, and the same being about to be sued out, returnable on the fourth Monday of September next.

Now, if the said John Willson and David Willson shall prosecute their suit with effect, or, in case of failure therein, shall well and truly pay and satisfy the said all such costs in said suit, and such damages as shall be awarded against the said John Willson and

David Willson, their heirs, executors, or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then this obligation to be void, otherwise to remain in full force and effect.

JOHN WILSON, [SEAL.]
JOHN W. SPENCER. [SEAL.]

Witness: J. CONWAY.

I approve of the above security.

J. CONWAY, *Clerk.*

The people of the State of Illinois, to the sheriff of Rock Island county, greeting:

Whereas John Wilson hath complained on oath that J. C. Shepherd, Hempstead and Bebee, and American Fur Company, are justly indebted to himself and David Willson, as partners, to the amount of two thousand five hundred dollars, upon a certain promise, in writing, made by the said defendants to the said John Wilson for the benefit of said partners, dated the 12th day of July, 1840, for the use of the steamboat Rock Islander, and for the damage done to her by said defendants; and oath having been made that the said defendants are about to depart from this State, with the intention of having their effects and personal estate removed without the limits of this State, and the said John Willson and David Willson having given bond and security, according to the directions of the act in such case made and provided, we therefore command you that you attach so much of the estate, real or personal, rights and credits, moneys and effects, of the said defendants, to be found in your county, as shall be of value sufficient to satisfy the said damages and costs, according to the complaint; and such estate, so attached, in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at a court to be holden at Stephenson, in the county of Rock Island, upon the fourth Monday of September next, so as to compel the said defendants to appear and answer the complaint of the said John Willson and David Willson, when and where you shall make known to the said court how you have executed this writ, and have you then there this writ.

Witness Joseph Conway, clerk of the circuit court of Rock Island county, at Stephenson, this 23d day of July, in the year of our Lord eighteen hundred and forty.

JOSEPH CONWAY, *Clerk.*

On the back of said writ is the following return by the sheriff, to wit: "I return this writ not served, the suit settled by the parties.

LUCIUS WELLS, *Sheriff,*
By JOHN A. BYER, *Dep'ty sh'ff.*

STATE OF ILLINOIS, *Rock Island county, ss:*

I, Joseph Conway, clerk of the circuit court for said county, do

certify, that the foregoing affidavit and bond are correct copies from the original on file in my office.

Witness Joseph Conway, clerk of said court, and the seal thereof, at Stephenson, this 7th day of April, 1841.

[SEAL.] JOSEPH CONWAY, *Clerk.*

At a circuit court held for Rock Island county, State of Illinois, on the second day of October, A. D. 1840, before the honorable Dan. Stone, judge.

JOHN WILSON and David Willson, partners of the steamboat Rock Islander, against J. C. SHEPHERD, Hempstead and Bebee, and American Fur Company. } Attachment.

This day came the plaintiffs, by their attorney, and say they will no further prosecute this suit, but dismiss the same. It is therefore considered by the court that this suit be dismissed, and that the defendants have and recover of the plaintiffs their costs by them about their suit in this behalf expended, and that they have execution therefor.

I, as clerk of the circuit court of Rock Island county, do certify, that the foregoing is a true copy taken from the original on file in my office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said circuit court at Rock Island, this 5th day of October, 1841.

[SEAL.]

JOSEPH CONWAY, *Clerk.*

STATE OF ILLINOIS, *Rock Island county, ss:*

I, Thomas C. Brown, one of the justices of the supreme court of said State, and presiding judge of the sixth judicial district, do hereby certify, that Joseph Conway, whose name appears to the above certificate, was, on the day the same was made, the clerk of circuit court for Rock Island county, regularly appointed and qualified, and that his said certificate is in due form of law.

Given under my hand and seal this 5th day of October, A. D. 1841.

THOMAS C. BROWNE. [SEAL.]

The defendants, further to support the issue on their part, offered in evidence to the jury the following certificate, signed by Horace Anthony, the plaintiff's witness, (the certificate here named is not to be found among the papers in this case,) and offered to prove by the said witness, by whose authority he made the propositions contained in said certificate, with all the circumstances connected with that transaction, for the purpose of shewing, in mitigation of damages, the estimate thereof made by the plaintiff; to the reading of which letter in evidence, and the examination of the said witness in relation thereto, the plaintiff objected, and which objection the court sustained, and rejected the evidence. The plaintiff then, by leave of the court, offered evidence, and proved, by J. H. Thorington, esq., that after the date of said certificate, that Capt. Shep-

herd told witness that the arrangement contained in said letter had not been carried into effect, and that he would not then comply with it.

The defendants having no further evidence to offer, here closed their defence.

The defendants then moved the court, that, from the evidence offered, they are entitled, by the law of the land, to a judgment of non-suit in this cause, because David Willson was a joint partner with the plaintiff in the ownership of the steamboat Rock Islander, and all the ferry privileges and appurtenances connected therewith, and a partner and jointly interested in the earnings of said boat, and in the matters for which this suit is brought with the said plaintiff, and ought to have been made a party plaintiff in said suit with the said John Willson, and pray the court to order a judgment of non-suit in said cause; which motion the court refused; and to which decisions of said court, before given, the defendants except, and pray the court to sign and seal this their first bill of exceptions; which is accordingly done this 21st day of December, 1843.

[SEAL.]

The defendants further pray the court to instruct the jury, that if they believe, from the evidence, that there was no culpable neglect or carelessness on the part of Capt. Shepherd in the use of the steamboat Rock Islander, by which she became injured, that the plaintiff is only entitled to recover in this action the sum of fifty dollars a day for the use of said boat, for the three days she was in his possession, from the time of hiring to the time of her return to Davenport, and only a fair and reasonable allowance for such damage as the plaintiff may have proved he has sustained by the non-delivery of the said boat at Stevenson in good order; after that time for a reasonable time to allow the plaintiff to have said boat repaired; which instruction the court refused to give, but instructed the jury as follows, to wit: That it was the duty of the jury to inquire how many days the defendants used the boat under the contract, and whether they returned the boat in accordance with the terms of the contract. If they did not, then to inquire what damage the plaintiff sustained; that, in fixing the amount of damages, the jury should act conscientiously, and within reasonable bounds; that if the plaintiff permitted the boat to remain an unreasonable time before commencing to repair her, he would not be entitled to any compensation for the loss of the use of the boat for that time; that the jury should inquire what expenses were necessarily incurred in repairing the boat, and that it was their province to fix this amount, and to say, from the testimony, whether it was necessary to have her taken to St. Louis, or whether she might have been repaired nearer home; to say whether the repairs which were put upon her were necessary, and what was a reasonable charge for such repairs; that the jury should say, from the testimony, when it was reasonable time to stop the per diem allowance, but that for the time that the defendants caused the boat to be in a situation to be of no use to the plaintiff, he is entitled to the per diem allowance; to which direction of the court the defendants except, and pray the court to sign and

seal this their second bill of exceptions; which is accordingly done, this 21st day of December, A. D. 1843.

T. S. WILSON. [SEAL.]

Verdict of the jury.

And afterwards, to wit, on the day and year aforesaid, (to wit, the 7th day of October, 1841,) the jurors aforesaid upon their oaths do say, they find the issue for the plaintiff, and assess his damages at the sum of *eighteen hundred* and *thirty-seven* dollars and *fifty* cents; and thereupon the said defendants filed the following motion for a new trial, to wit:

Grounds for a new trial.

Scott county, district court, Oct. term, 1841.

JOHN WILSON
vs.
J. C. SHEPHERD and als.

Now come the defendants, by their attorney, and move the court for a new trial in the above case—

1. Because the verdict is against the law.
2. Because the verdict is against evidence.
3. Because the verdict is against the charge of the court.
4. Because the verdict is without evidence.
5. Because the damages found by the jury are excessive.

J. D. LEARNED, *att'y def'ts.*

Additional reason.

6. Because the def'ts have discovered new evidence, material and proper for them, which was unknown at the time of trial.

J. D. L.

Motion for new trial taken under advisement—continued.

And afterwards, to wit, on the 9th day of October, in the year aforesaid, this cause came on to be heard on the motion for a new trial filed on a previous day of this court, and the arguments of counsel having been heard, the court took the same under advisement, and ordered that this cause be continued.

Motion for new trial overruled.

And afterwards, to wit, on the 12th day of April, in the year of our Lord eighteen hundred and forty-two, the following proceedings were had, to wit:

JOHN WILSON
vs.
JOHN C. SHEPHERD et al. } Assumpsit.

And now come the parties by their attorneys, and the defendants move for judgment on the motion for a new trial, made and argued at the last term of this court in this cause, and held under advisement until the present term.

Judgment.

It is considered by the court, that said defendants taking nothing by their said motion; and thereupon, the plaintiff moves the court for judgment upon the verdict rendered by the jurors aforesaid at the last term of this court in this cause. It is therefore considered by the court, that the plaintiff recover of the defendants the said sum of eighteen hundred and thirty-seven dollars and fifty cents, his damages aforesaid in form aforesaid assessed, besides his costs by him about his suit in this behalf expended, and that execution issue therefor.

Appeal granted.

And thereupon, the said defendants, by their attorney, prays an appeal, which was allowed.

Execution.

And afterwards, to wit, on the 9th day of May, in the year last aforesaid, the following execution was issued by the clerk aforesaid, to wit:

TERRITORY OF IOWA, *Scott county, ss:*

The United States of America, to the sheriff of said county, greeting:

We command you, that of the goods and chattels, lands and tenements, of John C. Sheppard, *Piere* Chouteau, jr., John B. Sarpie, John F. H. Sanford, John P. Cabanne, S. A. Seine, Henry Sibley, Hercules Douman, William Hempstead, Edward Bebee, and William Cupp, in your county, you cause to be made eighteen hundred and thirty-seven dollars and fifty cents, which John Willson hath lately in our district court of said county recovered against the said John C. Sheppard, *Piere* Chouteau, jr., John B. Sarpie, John F. H. Sanford, John P. Cabanna, S. A. Seine, Henry Sibley, Hercules Douman, William Hempstead, Edward Bebee, and William Cupp, for his damages which he has sustained by reason of the nonperformance of certain promises and undertakings made by the said John C. Sheppard, *Piere* Chouteau, jr., John B. Sarpie, John F. H. Sanford, John P. Cabanna, S. A. Seine, Henry Sibley, Hercules Douman, William Hempstead, Edward Bebee, and William Cupp, to the said John Willson, together with sixty-five dollars and ninety-three $\frac{1}{4}$ cents, adjudged to him in our said court for his costs by him about his suit in that behalf expended; whereof the said John C. Sheppard, *Piere* Chouteau, jr., John B. Sarpie, John F. H. Sanford, John P. Cabanna, S. A. Seine, Henry Sibley, Hercules Douman, William Hempstead, Edward Bebee, and William Cupp, are convicted, as appears to us of record; and have you that money before us at Davenport, in said county, on the eighteenth day of July next, to render to the said John Willson for his damages and costs aforesaid; and have you then there this writ, with a return of your doings herein.

Witness the honorable Thomas S. Wilson, judge of the third judicial district of said Territory, and the seal of said court affixed at Davenport, this ninth day of May, A. D. 1842.

[L. S.]

D. HOGE, *Clerk.*

Sheriff's return.

Said writ was afterwards, to wit, on the 18th day of July, 1842, returned by the said sheriff, endorsed as follows, to wit:

"No property found in Scott county, belonging to the within named defendants, this 18th day of July, 1842. Fee, 25.

A. H. DAVENPORT, *S. S. C.*
By his deputy W. B. WATTS."

Plaintiff's motion for judgment.

And afterwards, to wit, on the third day of October, in the year of our Lord 1842, the said plaintiff filed in the court aforesaid the following motion for judgment in this cause, to wit:

WILLSON
vs.
SHEPHERD and others.

And now, at this day, October term, 1842, comes the said plaintiff, by Mitchell & Grant, his attorneys, and moves the court to enter up judgment in this cause, as of the last fall term of this court.

MITCHELL & GRANT, *for plaintiff.*

Second judgment.

And afterwards, to wit, on the 7th day of October, in the year last aforesaid, the following proceedings were had, to wit:

JOHN WILLSON
vs.
JOHN C. SHEPHERD, *Piere* Chouteau, jr., John B. Sarpie, John F. H. Sanford, John P. Cabanna, S. A. Seine, Henry Sibley, Hercules Dousman, William Hempstead, Edward Bebee, and William Cupp. } Assumpsit.

This day came the said plaintiff, by his attorney, and it appearing to the court, that at a previous term of this court, to wit, the October term, 1841, the issue previously joined in this cause was submitted to a jury, who, after hearing the evidence and arguments of counsel, returned into court the following verdict, to wit, they find the issue for the plaintiff, and assess his damages at the sum of eighteen hundred and thirty-seven dollars and fifty cents.

Appeal prayed by defendants.

Whereupon, a motion was made by the attorney for defendants for a new trial herein, which motion was at said October term taken under advisement by the court; and it further appearing to the court, that this court has not at any time since decided said motion, but that said motion was continued under advisement until the present term, that the order of continuance at last term was not entered of record. It is therefore ruled, that said order of continuance be entered "nunc pro tunc;" and the court having now fully considered the said motion for a new trial, doth overrule the same. And it further considered by the court,

that the plaintiff have and recover of and from the said defendants, the said sum of eighteen hundred and thirty-seven dollars and fifty cents, his damages in manner and form aforesaid assessed, together with his costs by him about his suit in that behalf expended, and that a special execution against the property attached issue therefor; thereupon, the defendants prayed an appeal to the Supreme Court.

Bill of exceptions filed.

And afterwards, to wit, on the 26th day of December, in the year of our Lord 1843, the said defendants filed in the office of the clerk of the said district court the aforesaid bill of exceptions, signed by the court:

TERRITORY OF IOWA, *Scott county, ss:*

I, David Hoge, clerk of the district court of said county, do hereby certify, that the foregoing is truly taken and copied from the records of proceedings of the said district court within and for the said county of Scott.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, this 28th day of December, A. D. 1843.
[L. S.]

D. HOGE, *Clerk.*

Endorsed, filed in my office, January 2, 1844.
Test: GEO. S. HAMPTON, *C. S. C.*

Assignment of errors.

And on the said second day of January, 1844, the said plaintiffs in error filed the following assignment of errors herein, to wit:

And now comes the said John C. Sheppard et al., plaintiffs in error, by Learned and Cook, attorneys, and saith, that in the record and proceedings aforesaid, and also in the rendition of the judgment aforesaid, there is manifest error in this, to wit:

1st. That the court erred in rejecting the certificate, signed by Horace Anthony, and his testimony in relation thereto, offered in mitigation of damages.

2d. The court erred in not sustaining the motion of the defendants for judgment of non-suit in this cause for the non-joinder of David Wilson, a joint partner with the plaintiff in the subject-matter of this suit.

3d. The court erred in refusing to instruct the jury as prayed by the defendants, to wit: "That, if the jury believe from the evidence, that there was no culpable neglect or carelessness on the part of Capt. Sheppard in the use of the steamboat Rock Islander, by which she became injured, that the plaintiff is only entitled to recover in this action the sum of fifty dollars a day for the use of said steamboat, for the three days she was in his possession from the time of hiring to the time of her return to Davenport, and only a fair and reasonable allowance for such damage as the plaintiff may have proved he has sustained, by reason of the non-delivery of said boat at Stephenson in good order, after

that time, for a reasonable time to allow the said plaintiff to have said boat repaired."

4th. The court erred in submitting the construction of the contract to the jury as matter of fact, the same being matter of law, and should have been decided by the court.

5th. The court erred in instructing the jury that "for the time the defendants caused the boat to be in a situation to be of no use to the plaintiff, he is entitled to the per diem allowance."

6th. The court erred in overruling the motion of the defendants for a judgment of non-suit, because no copy of the instrument of writing upon which this suit was brought was filed ten days before the second term of the court, after the suit was commenced.

7th. The court erred in rendering a judgment on the verdict, on the twelfth day of April, 1842, on the motion of the plaintiff.

8th. The court erred in rendering a judgment at the October term, 1842, after a writ of error was sued out and made a supersedeas by allowance of a judge of the Supreme Court.

9th. The court erred in entering an order for a continuance of this cause *nunc pro tunc* at the October term, 1842, and in proceeding to enter a judgment upon the verdict of the jury at said term upon motion of the said plaintiff.

Whereupon, the said plaintiff prays that the judgment aforesaid, for the errors aforesaid, in form aforesaid assigned, and others in the record and proceedings aforesaid being, may be reversed, annulled, and entirely made void, and that the defendant aforesaid may rejoin to the errors aforesaid, and that the honorable court here may proceed to the examination, as well of the record and proceedings aforesaid, and the judgment aforesaid, as of the matters aforesaid above for errors assigned, and may further cause to be done therein, for the correcting of that error, what of right, and according to the laws and customs of the land, ought to be done in the premises.

J. D. LEARNED & E. COOK,
Attorneys for plaintiff in error.

Motion to reject bill of exceptions.

And afterwards, to wit, on the 3d day of January, 1844, the said defendant in error filed the following motion herein, to wit:

And now comes the said Wilson, and moves the court to strike from the record and *the* reject from the consideration of the court in examining the writ of error the bill of exceptions filed, and dated in December, 1843.

MITCHELL & GRANT,
For defendant in error.

Motion to dismiss first writ of error.

And afterwards, to wit, the said defendant in error, on the 5th day of January, 1844, filed herein the following, to wit:

The said defendant in error moves the court to dismiss the writ of error, dated 26th of September, 1842, referring to a judgment rendered on the 12th of April, 1842, and returnable to the January term of this court, for the year 1843. Because the said writ of error was not filed in pursuance of the laws of the Territory *then in force*, nor the rules of the Supreme Court at the return term thereof. Because the said writ is not returnable to this court at this term.

The defendant also moves the court to strike from the record filed so much thereof as relates to a judgment rendered, April 12, 1842, and not referred to in a writ of error returned to this term, and reject the same from the consideration of the court, in examining said last writ of error.

MITCHELL & GRANT,
For defendant in error.

And afterwards, to wit, at a supreme court continued and held in and for Iowa Territory, at the capitol, in Iowa city, on the 6th day of January, A. D. 1844.

Motion to reject bill of exceptions sustained.

This day came the parties aforesaid, by their attorneys, and thereupon the defendant in error moved the court to reject the bill of exceptions taken in the court below, and copied into the transcript filed herein, for reasons on file; which motion being heard by the court, and the court being now sufficiently advised of and concerning the same, do order that said motion be sustained. It is therefore ordered by the court, that the said bill of exceptions be rejected.

Motion to dismiss first writ of error overruled.

And thereupon the defendant moved the court to dismiss the first writ of error herein, for reasons on file; which motion being heard by the court, and the court being now sufficiently advised of and concerning the premises, do order that said motion be overruled.

Certiorari awarded.

And on motion of said defendant, a writ of certiorari is awarded him, herein directed to the clerk of the district court of Scott county, requiring him to certify and send up forthwith a more true and perfect transcript of the record and proceedings had in the court below.

And thereupon the following writ of certiorari issued, to wit:

Certiorari.

UNITED STATES OF AMERICA,
Territory of Iowa, ss:

The United States of America, to the clerk of the district court of Scott county, greeting:

Whereas the transcript of the record and proceedings of a certain cause pending in the district court of your county, John Wilson is plaintiff, and John C. Shepherd and others, are defendants, was certified to our supreme court at Iowa city; and whereas it is suggested that the said

transcript is incomplete in this, to wit, that you have failed to send up and certify a certain affidavit on which this suit was commenced by attachment; and also, in your certifying that the bill of exceptions mentioned was tendered at or after the trial of said cause, whereas it is suggested that no such matter appears of record.

These are to command you, that you certify and send up to us said affidavit, and the contents thereof, and that you certify whether it appears of record that any or what bill of exceptions was tendered at or during the trial of said cause, instantly, sealed and enclosed with this writ.

Witness, the honorable Chas. Mason, chief justice of our said supreme court at Iowa city, with the seal of said court hereunto affixed, this 6th day of January, 1844.

[SEAL.]

GEO. S. HAMPTON,
C. S. Court, I. T.

Return.

And afterwards, to wit, on the 11th day of January, 1844, this said writ of certiorari was returned, with the following endorsement thereon, to wit: In answer to the within writ, I send up the following transcript and certificate.

D. HOGE, *Clk. D. C., S. C.*

Transcript.

THE TERRITORY OF IOWA, *Scott county:*

Affidavit.

Personally appeared before me, David Hoge, clerk of the district court of said county, John Wilson, who made oath, that upon the 12th day of July, A. D. 1840, he made a contract with John C. Sheppard, master and commander of the steamboat Ariel, in the words and figures following, to wit: "I promise to pay John Wilson at the rate of fifty dollars per day for the use of his ferry boat, Rock Islander, to lighten the cargo of the steamer Ariel over the upper rapids, of which fifty dollars is paid in advance, to furnish the boat with hands and pilots, as also fuel, and the necessaries for running the boat over, and return her to the said Wilson, at Stephenson, Ill., in like good order as received.

J. C. SHEPPARD,
For steamboat Ariel and owners."

Stephenson, July 12th, 1840.

That this affiant is informed, and does believe, that said boat is owned by said J. C. Sheppard, and by the mercantile firms of H. N. Davis & Co., Hempstead & Bebe, and that the said Sheppard, and the said several firms, are all non-residents of this territory; and that in accordance with the contract and agreement so made on the part and behalf of the said owners, this affiant delivered the said ferry boat, the Rock Islander, "to J. C. Sheppard, the captain and commander of said steamboat Ariel, to be manned, supplied, and used for the benefit of said

owners, in lightening the cargo of the said steamboat Ariel over the upper rapids, according to the terms of said agreement so made as aforesaid; and that after said boat was so delivered to the said Sheppard for the purpose aforesaid, he so carelessly used said boat, and so badly piloted and managed her, that said boat struck upon said rapids of the Mississippi river, thereby damaging and knocking a hole into the bottom of said boat, the "Rock Islander," and causing her to leak so as to be unfit and incapable of running on said river; and that said John C. Sheppard, H. N. Davis & Co., and Hempstead and Bebe, wholly disregarding their said agreement, so made as aforesaid, have wholly neglected and failed to perform the said agreement, and have not as yet returned the said ferry boat, the Rock Islander, in like good order as received, to this affiant at Stephenson, Illinois, and have also neglected and failed to pay to said John Wilson, at the rate of fifty dollars a day for the use of said boat while in their possession; said affiant further makes oath, that said ferry boat, Rock Islander, is so injured and damaged, that it will cost, as he verily believes, to take her to the city of St. Louis, and have her repaired, and return to Stephenson, Illinois, the full sum of two thousand dollars; and that St. Louis is the nearest point which said boat can be repaired and put into the like good order as when received by said defendants; and that the want of said boat to be used by said Wilson in the meantime, will be worth at least five hundred dollars, making the aggregate amount justly due to said Wilson from said defendants, is at least two thousand and five hundred dollars.

JOHN WILSON.

Sworn to this 22d day of July, A. D. 1840.

D. HOGE,
Clerk dist. court Scott Co.

Clerk's certificate.

TERRITORY OF IOWA, *Scott county, ss:*

I, David Hoge, clerk of the district court of said county, do hereby certify, that the foregoing affidavit is truly taken and copied from the original on file in my office; and I do further certify, that I have carefully examined the records of said court, and find *no entry of record* that any bill of exceptions was tendered at or during the trial of said cause, or at any other time during the progress thereof.

In testimony whereof, I have hereunto set my hand, and affixed the [SEAL.] seal of said court, this 8th day of January, A. D. 1844.

D. HOGE, *Clerk.*

And afterwards, to wit, on the 8th day of January, 1844, the said defendant in error filed the following joinder in error, to wit:

Joinder in error.

And now comes said Wilson, by Mitchell & Grant, his attorneys,

and says, that in the record and proceedings of said cause there is no error, &c., and he prays that said judgment may be affirmed.

MITCHELL & GRANT,
For deft. in error.

And afterwards, to wit, at a supreme court, continued and held as aforesaid, on the 10th day of January, 1845—

Rule against defts. to furnish plff. brief points.

On motion of the defendant in error, by his attorney, a rule is granted him herein against the said plaintiffs in error, to shew cause, if any they have, why they do not furnish the defendant in error with a brief of the points relied on in this cause.

And afterwards, to wit, at a supreme court, continued and held as aforesaid, on the 11th day of January, 1844—

Rule made absolute.

On motion of the defendant in error, by his attorney, it is ordered by the court, that the rule *is* granted herein on yesterday against the plaintiffs in error be made absolute. It is therefore ordered by the court, that the plaintiffs' counsel forthwith furnish the defendant's counsel with a brief of points made in this cause, and authorities cited.

And afterwards, to wit, at a supreme court, continued and held as aforesaid, on the 12th day of January, 1844—

Motion for a mandamus to the judge of district court overruled.

This day came the parties aforesaid, by their attorneys, and thereupon the plaintiffs moved the court for a writ of mandamus to issue to the judge of the court below, which motion was overruled by the court.

And afterwards, to wit, at a supreme court, continued and held as aforesaid, on the 13th day of January, 1844—

Bill of exceptions filed.

This day came the parties aforesaid, by their attorneys, and thereupon the plaintiffs in error filed their bill of exceptions herein, which being signed, sealed, and allowed by the court, is ordered to become a part of the record herein, and is as follows, to wit:

Bill of exceptions.

And now, at the present term of the said supreme court, the defendant in error, by his counsel, comes, and moves the said supreme court as follows, to wit:

SHEPHERD and others
vs.
WILSON.
} Errors from Scott county.

And now comes the said Willson, and moves the court to strike from the record, and *the* reject from the consideration of the court in exam-

ining the writ of error, the bill of exceptions filed and dated in December, 1843.

MITCHELL & GRANT,
For deft. in error.

Which motion the said supreme court sustained, and passed the following order, (here insert the order of court upon said motion,) (see page ,) and gave the following opinion therefor, (here insert the opinion of the court,) (no written opinion delivered.) To which decission of the said supreme court, upon the motion aforesaid, the plaintiffs in error except, and pray the court to sign and seal this bill of exceptions, which is accordingly done this 11th day of January, 1844.

PH. S. WILSON, [SEAL.]
Associate judge sup. court.
J. WILLIAMS, [SEAL.]
Associate judge sup. court.

The plaintiffs in error then filed, in the said supreme court, to wit, on the 11th day of January, 1844, and during the January term of said court, the following notice, motion, and affidavit for a writ of mandamus:

JOHN C. SHEPHERD et al., plffs. in error,
vs.
JOHN WILSON, deft. in error.

Supreme court, January term, 1844.

The attorney for defendant in error will take notice, that we shall apply to the supreme court, now in session, on to-morrow morning, for a writ of mandamus directed to the Hon. Thomas S. Wilson, judge of the district court of Scott county, requiring him to sign, nunc pro tunc, the bill of exceptions tendered on the trial of this cause in the court below by the defendants below, or shew cause why the same should not be done, and that the same may be attached to the record in this cause.

J. D. LEARNED & E. COOK,
Att'ys for plffs. in error.

I accept service of this notice, January 10th, 1844.
G. C. R. MITCHELL,
Att'y for def'ts.

JOHN C. SHEPPARD, et al.
vs.
JOHN WILSON.

Supreme court, January term, 1844.

And now, on this day, comes the plaintiffs in error in this cause, and moves the court for a writ of mandamus, to issue from this court, directed to the honorable Thomas S. Wilson, judge of the district court

of Scott county, requiring him to sign and seal, *nunc pro tunc*, the bill of exceptions tendered on the trial of this cause before the said district court by the defendants below, or shew cause why the same should not be done; and that the same, when so signed, may be attached to the record in this cause.

J. D. LEARNED & E. COOK,
Attorneys for pl'ffs in error.

The above motion is founded on the following state[ment] of facts, to wit: During the trial of this cause, exceptions were taken by the defendant's counsel, and were reduced to writing as the said exceptions occurred in the progress of the trial, but were not reduced to form, and the bill of exceptions settled, until after the trial; and during the term, to wit, on the next day, the said exceptions, and the counsel for the parties not *be* able to agree upon certain matters therein contained, the counsel for the defendants below delivered the said bill of exceptions to the judge of said court in open court, to be settled by the said judge according to his notes, and the truth of the facts, as he recollected the same to be, and to be, when so settled by him, signed. A motion was made for a new trial, which motion was held under advisement by the court, and the said judge took the said bill of exceptions, with all the papers in the cause, to his residence, as this deponent is informed, and verily b*eleives*. That at the next term of said court, the Hon. Judge Williams presiding, the said Judge Wilson wrote a letter, in which, after overruling the motion for a new trial, he stated, in substance, as near as this deponent can recollect, that he did not recollect whether he had signed the bill of exceptions in this case; if he had not, he would do so. This deponent further states, that he has desired and requested the said judge to sign the said bill of exceptions, *nunc pro tunc*, which he declines to do. J. D. LEARNED.

Sworn and subscribed, in open court, this 11th day of January, 1844.

Test: GEO. S. HAMPTON, *C. S. C.*

But the said court refused to grant the said writ of mandamus, as prayed for in said motion, for the following reasons, (here insert the de*cission* of the court,) (no written opinion given,) to which de*cission* of the said supreme court, in refusing the said writ of mandamus, the plaintiffs in error except, and pray the court to sign and seal this their second bill of exceptions, which is accordingly done, this 12th day of January, 1844.

T. S. WILSON, [SEAL.]
J. WILLIAMS, [SEAL.]
Associate judges sup. court.

Submitted to the court.

And thereupon this cause came on to be heard, and the court not being now sufficiently advised of and concerning the premises, took the same under advisement.

And afterwards, to wit, at a supreme court continued and held as aforesaid, on the 8th day of January, 1845.

This day came the parties aforesaid, by their attorneys, and thereupon the plaintiffs in error suggest a diminution of the transcript of the record filed herein, and moved the court to award a writ of certiorari to be directed to the clerk of the court below, to certify and send up a more full and complete transcript of the record and proceedings had in this cause in the court below; which motion was argued, and the court not being sufficiently advised of and concerning the said motion, took time to consider of the same.

And afterwards, to wit, at a supreme court, continued and held as aforesaid, on the 9th day of January, 1845.

Motion for certiorari to issue overruled.

This day came the parties aforesaid, by their attorneys, and the court being now sufficiently advised of and concerning the plaintiffs' motion for writ of certiorari to issue, do order the said motion to be overruled.

And now, at this day, to wit, at a supreme court continued and held as aforesaid, on the 10th day of January, 1845.

Judgment affirmed.—Judgment.

This day came the parties aforesaid, by their attorneys, and this cause now coming on to be heard, and the court being now sufficiently advised of and concerning the premises, affirm the judgment of the court below.

It is therefore considered by the court, that the judgment of the court below be affirmed, and that a writ of procedendo issue to the court below accordingly; and it is further considered by the court, that the defendant in error recover of the plaintiffs in error the costs herein expended in this court, and that execution issue for the same.

And thereupon the court filed with the clerk of the said supreme court the following opinion, to wit:

Opinion.

The record in this case shows, that, at October term of 1841, a verdict was rendered against the plaintiffs in error for $1,837 50, and thereupon they filed a motion for a new trial; after argument upon this motion, the court took the same under advisement.

Afterwards, under the date of April 12th, 1842, the following entry appears: "And now come the parties, by their attorneys, and the defendants move for judgment on the motion for a new trial made and argued at the last term of this court in this cause, and held under advisement until the present term. It is considered by the court, that said defendant take nothing by their said motion; and thereupon the plaintiff moves the court for judgment upon the verdict rendered by the jurors aforesaid, at the last term of the court, in this cause. It is therefore considered by the court, that the plaintiff recover of the defendants, &c.," (completing the regular entry of a judgment.) On this judgment

a writ of error was sued out, dated September 26th, 1842. This writ of error was allowed for probable cause, but no bond was filed in pursuance of the statute, so far as appears by the record, nor is there any thing to show when the writ of error was served, or whether it was ever served, except from the return of the clerk of the district court of Scott county, dated December 28th, 1843, merely certifying up a transcript of the record.

Under the date of October 7th, 1842, the following entry is found in the record: "This day came the said plaintiff, by his attorney, *by his attorneys*, and it appearing to the court that, at a previous term of this court, to wit, the October term, 1841, the issue previously joined in this cause was submitted to a jury, who, after hearing the evidence and arguments of counsel, returned into court the following verdict, to wit: They find the issue for the plaintiff, and assess his damages at the sum of $1,837 50; whereupon a motion was made by the attorney for the defendants for a new trial herein, which motion was, at said October term, taken under advisement by the court. And it further appearing to the court that this court has not, at any time since, decided said motion, but that said motion was continued under advisement until the present term; that the order of continuance at last term was not entered of record; it is therefore ruled that said order of continuance be entered, *nunc pro tunc*. And the court, having now fully considered the said motion for a new trial, doth overrule the same; and it is further considered by the court that the plaintiff have and recover, &c.," (completing the entry of a judgment in the usual form.)

I shall first consider the judgment of April 12th. There is nothing upon the face of the record to cast the least suspicion upon its regularity. But a reference to the statute, and the almanac, shows that it was not entered up during the period prescribed by law for the court in Scott county. The court in 1842 commenced in Scott county on the 4th, and in Clinton county, in the same district, on the 11th of April; of course, this judgment in the Scott county court was entered upon the second day for the court in Clinton county.

This, I think was irregular, and I come to this conclusion the more readily, as both parties in this case admit, and contend for it; the only difference between them on this subject is, that on the part of the defendant in error, it is contended that the judgment is not only irregular but an absolute nullity, to be entirely disregarded both here and in the court below; while the counsel for the plaintiff in error insists, that it is an irregularity to be remedied only by a writ of error. I think the judgment though erroneous was not a nullity; if, therefore, the necessary steps were taken, before the rendition of the second judgment, to cause the writ of error, dated September 26th, to operate as a supersedeas, the case must be reversed; for in that case the second judgment must also be erroneous; after the taking effect of the supersedeas, there can be no further action upon the case in the court below; the subsequent correction of a previous error would itself be erroneous. Was there

then a supersedeas prior to the entry of the second judgment? I find no evidence of it in the record, and the court below will not be presumed to have disobeyed a supersedeas without proof. The writ of error was dated prior to the entry of the second judgment; it was also allowed for probable cause, as required by the statute. But the bond should also have been filed, and the writ served before the court below was bound to obey it; there is nothing to show that either of these was done. The case cannot therefore be reversed, on the ground that the second judgment was rendered in disregard of a writ of supersedeas.

The question finally arises whether, even without the intervention of such a writ, the court was authorized in entering up the second judgment, and whether such second entry cured the error of the first; I think the second entry was correct, and that it cured the defect of the first; at all events, no error has been committed in the transaction of which the plaintiffs in error can avail themselves. The first judgment having been entered when the court was not in session, it seems to me to have been proper for the court at the next term to have entered a regular judgment. It is merely doing in a summary way what this court must have directed to be done, had the case been brought up by a writ of error on the first judgment. And if the case is sent back now, it will be merely to direct the court below to enter up a regular judgment in term time, the very thing which has already been done at the October term of 1842; if any error has been committed in this respect, it has wrought no prejudice to the plaintiffs in error. They cannot, therefore, take advantage of it.

I think the judgment of the court below should be affirmed.

Affidavit of pl'ffs in error.

And thereupon the plaintiffs in error filed herein the following affidavit, to wit:

JOHN C. SHEPPARD, *Peire* Chouteau, jr., John B. Sarpy, John F. H. Sandford, John P. Cabanna, S. A. Siene, Henry Sibley, Hercules Dousman, William Hempstead, Edward Bebee and William Cupp, plaintiffs in error,
vs.
JOHN WILSON, defendant in error.

In the supreme court of the Territory of Iowa.

John B. Sarpy, of the city of St. Louis, and State of Missouri, one of the plaintiffs in error in this cause, being duly sworn, doth depose and say, that the amount in controversy in this cause exceeds the sum of one thousand dollars.

JOHN B. SARPY.

STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered, that on the sixteenth day of May, A. D. 1844,

personally appeared before the undersigned, clerk of the circuit court, within and for the county aforesaid, John B. Sarpy, and made solemn oath, that the affidavit by him above subscribed is true, according to his best knowledge and belief.

In testimony whereof, I have hereunto set my hand, and affixed the [SEAL.] seal of said court the day and year above written.

JOHN RULAND, *Clerk.*
By SAMUEL RULAND, *Deputy.*

Endorsed.—Filed in my office, January 10, 1845.
Test: GEO. S. HAMPTON, *C. S. C.*

The said plaintiffs in error also filed the following bond herein, to wit:

Supersedeas bond.

Know all men by these presents, that we, *Piere* Chouteau, jr., and John B. Sarpy, of the city of St. Louis, and State of Missouri, and John N. Machlot, of Scott county, Iowa Territory, are held and firmly bound unto John Willson, in the full and just sum of three thousand eight hundred dollars, to be paid to the said John Willson, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 10th day of January, in the year of our Lord one thousand eight hundred and forty-five.

Whereas lately, at a supreme court for the Territory of Iowa, in a suit depending in said court, between John C. Sheppard, *Piere* Chouteau, jr., John B. Sarpy, John F. H. Sandford, John P. Cabanna, S. A. Seine, Henry Sibley, Hercules Dousman, Wm. Hempstead, Edward Bebee, and Wm. Cupp, plaintiffs in error, and the said John Willson, a judgment was rendered against the said Sheppard, Chouteau, Sarpy, Sandford, Cabanna, Seine, Sibley, Dousman, Hempstead, Bebee, and Cupp, and the said Sheppard, Chouteau, Sarpy, Sandford, Cabanna, Seine, Sibley, Dousman, Hempstead, Beebe, and Cupp, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said John Willson, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday in December next. Now, the condition of the above obligation is such, that if the said Sheppard, Chouteau, Sarpy, Sandford, Cabanna, Seine, Sibley, Dousman, Hempstead, Beebe, and Cupp, shall prosecute their said writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

P. CHOUTEAU, Jr. [SEAL.]
JOHN B. SARPY, [SEAL.]
JOHN N. MACKLOT. [SEAL.]

Sealed and delivered in presence of Bru. Clapp.

Witness: BRU. CLAPP.

As to the signature of J. N. Macklot, LOUIS A. MACKLOT.

Approved by me, CHARLES MASON,
Chief judge of the supreme court for Iowa Territory.

Endorsed.—Filed in my office, January 10th, 1845.
Test: GEO. S. HAMPTON, *C. S. C. I. T.*

UNITED STATES OF AMERICA,
Territory of Iowa, ss:

I, Geo. S. Hampton, clerk of the supreme court, in and for the Territory aforesaid, do hereby certify, that the foregoing sixty-seven and one half pages hereto attached, contain a full, true, and complete transcript of the record and proceedings had between the parties therein named, as full, true, and complete as the same remain in my office.

In witness whereof, I have hereunto set my name, and affixed the [SEAL.] seal of the said supreme court, at Iowa city, this 13th day of May, 1845.

GEO. S. HAMPTON.
Clerk of the supreme court, I. T.

Filed 2d January, 1846.